ATTORNEY FOR APPELLANT:

JAMES A. SHOAF
Columbus, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOHN ROLSTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0710-CR-461
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0610-CM-1992

July 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, JUDGE

Case Summary

Following his conviction for domestic battery, John Rolston appeals, contending that his trial counsel was ineffective for failing to make a timely demand for a jury trial. Finding no error, we affirm.

Facts and Procedural History

In October 2006, the State charged Rolston with domestic battery as a Class A misdemeanor.[1] At his initial hearing, the trial court informed Rolston of his right to counsel. Appellant's App. p. 9. The court's initial hearing order indicated that any "[d]emand for jury trial must be made in writing no later than 10 days prior to first scheduled trial date." *Id*. at 10. Rolston did not express any desire to have a jury trial. A bench trial ensued, with attorney Michael Kummerer[2] representing Rolston. At the conclusion of the trial, Rolston was found guilty as charged.

Before his sentencing hearing, Rolston, *pro se*, attempted to file a document titled "Recusal – Arrest of Judgment – Affidavit in Support of Recusal and Arrest of Judgment ("Rolston's document")." *Id*. at 13. Therein, Rolston quoted parts of the Second, Fifth, Seventh, and Fourteenth Amendments to the United States Constitution and stated that "none of the afore mentioned rights have been recognized by the Bartholomew County Prosecutors office or members of the Bartholomew County Bar Association and the Bartholomew Superior Court 1." *Id*. at 14.

[1] Ind. Code § 35-42-2-1.3.

[2] On January 30, 2008, the Indiana Supreme Court accepted Kummerer's resignation from the Indiana bar for his conviction under cause number 03C01-0704-FA-00790.

At sentencing, the court acknowledged its receipt of Rolston's document but did not consider it because his counsel, Kummerer, did not sign it. Thereafter, Kummerer indicated to the court that Rolston was not happy with the result and now wanted a jury trial. Tr. p. 161. Kummerer asked for leave to withdraw his representation. After the court explained to Rolston that Kummerer wanted to withdraw his representation, Rolston expressed his dissatisfaction with Kummerer's performance, stating, "I don't feel like I've been represented yet with this case[.]" *Id*. at 163. Rolston further explained, "I specifically hired [Kummerer] . . . to press for a trial by jury. He told me when we did hire him that he would file for the request. The request was never filed." *Id*. at 164. The court responded, "That may or may not be one piece of representation, but I don't know what happened with that. . . . It wasn't filed with the Court so I don't know, but you didn't say anything . . . about it when we had this for a bench trial." *Id*. Rolston again explained that he hired Kummerer "with the explicit intent of receiving a trial by jury." *Id*. The court responded, "that is between the two of you. Okay? He did represent you here in Court. He presented evidence. He cross examined witnesses." *Id*. at 165. Thereafter, the court sentenced Rolston to time already served and released him without probation. Rolston now appeals.

Discussion and Decision

Rolston argues that he received ineffective assistance of trial counsel. We review claims of ineffective assistance of trial counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate that counsel's performance was deficient because it fell below an objective standard of

reasonableness and denied the petitioner the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002), *reh'g denied*. Second, the petitioner must demonstrate that he was prejudiced by his counsel's deficient performance. *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002), *reh'g denied*. To demonstrate prejudice, a petitioner must demonstrate a reasonable probability that the result of the proceeding would have been different if his counsel had not made the errors. *Id*. A probability is reasonable if our confidence in the outcome has been undermined. *Id*.

Specifically, Rolston contends that Kummerer was ineffective because he did not ask for a jury trial as Rolston had requested. In response, the State contends that Rolston's "unsubstantiated claims may simply be an attempt at garnering a second trial because he was unsatisfied with the result of the first trial." Appellee's Br. p. 5. We agree with the State. At no point before the conclusion of his bench trial did Rolston complain about his case being tried to the bench. Rolston was aware that he had the right to a jury trial, as he was advised of same at the initial hearing, and he knew that he had to request a trial by jury within ten days of his first scheduled trial date. He did not do so. There was no complaint before the trial nor was there a complaint during the trial. In fact, Rolston did complain between the trial and sentencing that his constitutional rights under various constitutional provisions were violated, yet he did not specifically complain that he was denied his right to a jury trial. This is an after-the-fact complaint set forth as a result of Rolston's dissatisfaction with the outcome of his bench trial.

Because Rolston has failed to show that his counsel's performance was deficient, we affirm the judgment of the trial court.

Affirmed.

MAY, J., and MATHIAS, J., concur.